United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL APPENDIX

ORIGINAL WITH PROOF OF SERVICE

77-7209

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B

P/S

IRVING ELLENTUCK et al.,

Plaintiffs-Appellants,

-against-

JOSEPH B. KLEIN et al.,

Defendants-Appellees.

ON APPEAL FROM AN ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

SUPPLEMENTAL APPENDIX

UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

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ANSWERING AFFIDAVIT OF JULIUS GRANIRER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

IRVING ELLENTUCK, et al.,

Plaintiffs

ANSWERING AFFIDAVIT

-against-

Civil Action
No. 76 Civ. 2732

JOSEPH B. KLEIN, et al.,

Defendants

- -x

STATE OF NEW YORK)
)ss.:
COUNTY OF NASSAU)

JULIUS GRANIRER being duly sworn, deposes and says, that I am one of the defendants named as a party to the Second Cause of Action alleged in the plaintiffs' amended complaint in this action, and that I make this affidavit in opposition to plaintiffs' motion for summary judgment against me and Richmond Hill Savings Bank "as to liability".

In view of the vicious and scurrilous accusations of fraudulent conduct licentiously alleged against me in paragraphs 103-106 of said complaint, none of which are stated with any particularity or supported by any facts, I first submit, for such consideration as the Court may deem merited, my standing at the Bar and as a resident of the Rockaway Community, the site of the real property that is the subject of this action.

I was admitted to practice law in the state courts of New York at

the June, 1926 Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, and have ever since engaged in the practice of law, maintaining my law office in the Rockaway community. In 1933 or 1934, I was admitted to practice as an attorney in this and in the United States District Court for the Eastern District of New York. In 1934, I was admitted to practice before the United States Court for Customs and Patent Appeals, and in 1936, was admitted to practice before the United States Supreme Court.

I now am and for many years last past have been a member of the American, New York State and Queens County Bar Associations. I am a past president and, for the last twenty years, have served as a member of the Board of Trustees of the Queensboro Public Library. I now am and for the past thirteen years have been the president of the Peninsula Hospital Center. For the past twenty-seven years I have served as a member of the Advisory Committee for Queens, Brooklyn and Staten Island of the Chase Manhattan Bank, and for the past twenty years have been a member of the Board of Trustees of the defendant, Richmond Hill Savings Bank, which I have also served as an attorney.

Of more immediate relevance, perhaps, is that I am also a member of the Joint Bar Greviance Committee for the Second and Eleventh Judicial District of New York by appointment of said Appellate Division of the Supreme Court, Second Judicial Department. For, by

reason of that service, I am aware that lawyers have been disciplined by that court for conduct less than that so presumptuously and invidiously alleged against me by the plaintiffs in their said complaint. In sum, it is inconceivable that after all those years of service to my Bar, banking and community associations and activities, my honor and integrity should now be impugned by people who have not troubled themselves to so much as inquire into the matter with which they have so unjustly castigated me. And that is exacerbated by the horror of seeing an attorney's name so thoughtlessly and indifferently subscribed to those factually unfounded accusations, and permitting her clients to so discredit me without having made the slightest effort to ascertain whether there is any basis therefor in truth and fact. The truth of the matter, as hereinafter stated, dishonors not me but all those who joined in using said complaint as a vehicle for propagating those scurrilous accusations.

The amended complaint alleges in paragraph 98, that "the defendants, Kimballs" presented statements of "costs and expenditures" to the Board of Standards and Appeals and goes on to allege in paragraph 103 that those "costs and expenditures submitted by the defendants, Kimball were grossly exaggerated and were false and fraudulent." Then, in paragraph 105, I am encompassed in Kimballs' alleged fraud upon the Board of Standards and Appeals by the allegation that said "false and fraudulent statements of costs" were submitted by defendants,

Kimball, to said Board with my "knowledge and approval" and, as alleged in paragraph 106, "to further augment (those) alleged costs and expenditures, submitted to the Board of Standards and Appeals a statement of the additional alleged charges and prospective fees, the implication being that said additional charges and fees were also "false and fraudulent".

As the plaintiffs and their attorney well know, I was not a party nor did I represent or act as attorney for the Kimballs or any other person or party to the stated proceeding before the Board of Standards and Appeals, nor did I in any manner participate therein Consequently, I did not know, nor did I ever know, nor was I ever advised of what statements of costs and expenditures were to be or were submitted by the Kimballs or their attorney, Sheldon Lobel, to said Board. In fact, I do not know, nor did I ever know, nor was I ever informed of what those costs and expenditures consisted of, nor did I ever approve the submission thereof by the Kimballs or anyone else to said Board; what ever was done by the Kimballs in that regard was done upon their own initiative or upon the counsel of their attorney. It is also a fact that the Kimballs "costs and expenditures in the alteration of said premises" were not a matter of my concern, and I was not privy thereto.

The only expenses of which I had knowledge were those contained in the statement of "anticipated expenses" in connection with the $75,000.00 mortgage loan for which Kimball Construction Co. had applied

to the Richmond Hill Savings Bank. Said statement, a photo of my office copy of which is hereto annexed, was prepared by me solely for and was furnished by me solely to Kimball in accordance with my office practice. I did not furnish said statement to the Board of Standards and Appeals.

The estimated expenses contained in said statement correspond substantially with the charges for the respective items to which they relate. For example, the estimated mortgage tax, rounded out to $930.00, would actually amount to $927.50, pursuant to statute with which plaintiffs' attorney must have been familiar when she prepared and subscribed the complaint accusing me of furnishing exaggerated, false and fraudulent costs and expenses. On the other hand, the premimum for insuring the mortgage title of a $75,000.00 mortgage actually amounted to not less than $262.50, and today amounts to $307.00, so that my estimate of $225.00 for "Title Company Bill" not only was not exaggerated, false or fraudulent but was less than the actual cost thereof. "Survey inspection" expense conforms to the Bank's charge therefor, and the legal expenses conform with the fees thereof that would have been regularly charged by me to any other person in connection with a $75,000.00 mortgage loan transaction.

If said $75,000.00 mortgage loan had closed, said "itemized anticipated expenses" would have been actually charged to and actually paid in substance by Kimball. Hence, my estimate of said expenses was

not exaggerated, was not false and was not fraudulent. And for an attorney to subscribe a complaint which so characterizes said estimate without the merest interest in inquiring as to the bona fides and truth of that statement, is appalling and less than disgraceful.

Attention is respectfully directed to the fact that it was because of the failure of the complaint, in compliance with Rule 9 of the Federal Rules of Civil Procedure, to factually and with particularity, support the aforesaid allegations of my said fraudulent conduct, that my attorneys herein moved on that ground, beside others, for a dismissal of the complaint as against me and Richmond Hill Savings Bank (cf. memorandum in support of said motion pp.5,10-11).

Not only have the plaintiffs failed to answer to said motion to dismiss their complaint but, instead of so doing, have made this motion for summary judgment supported by their attorney's affidavit in which reference is made, on page 48, to my said statement of estimated expenses without a single particular or fact stated therein with respect to the complaint allegations that said expenses were exaggerated, false and fraudulent. To the contrary, plaintiffs' attorney most carefully refrains from so characterizing said estimated expenses Thus, the complaint allegations of those expenses as being exaggerated, false and fraudulent, and of my fraudulent conduct, continue to remain unsupported by and barren of any particulars and facts

Unable to extricate herself from the dilemma of her inability to

furnish any such particulars and facts, plaintiffs' attorney, without a single supporting fact, imprudently joins in the plaintiffs' scandalous attack of me by stating in her said affidavit that I "obviously gave the statement (of estimated expenses) to Kimball to submit to the Board to assist Kimball in obtaining the illegal variation on the ground of hardship". What is thereby being asserted by plaintiffs' attorney is her presumed knowledge of the state of my mind, i.e., my purpose, motive and intention Clearly, that was not and could not have been known to her as she was not present when I gave said statement to Kimball, and she never asked me why or for what purpose I had given it to him, or what my intention or motive was in so doing, and I never spoke to or communicated with her. So conclusory and unfounded an assertion is meritless and self-defeating The fact of the matter is that my said statement was furnished to Kimball, in accordance with my standard practice in such matters, of advising a proposed mortgagor of the costs and expenses attendant and required to be paid by him upon the closing of a mortgage loan.

Of greater moment and signifance is that the plaintiffs have wholly abandoned the only predicate of their complaint against me, to wit, that I was a conspirator in the alleged conspiracy because Kimball submitted exaggravated, false and fraudulent statements of costs and expenditures to said Board with my knowledge and approval. For the specific conduct, on the basis of which plaintiffs' attorney, in her said moving affidavit for summary judgment, charges me with being

a conspirator against the plaintiffs and their pretended class, is that I represented both Kimball and the Bank "when Kimball purchased the building and obtained the loan", and that my having acted in such "dual and conflicting capacities" was a "violation of the law that subjected me to personal liability for any loss sustained thereby (pp.47-48). The anomaly and invalidity of suing on a specifically alleged violation of plaintiffs' claimed rights and their seeking summary judgment upon that wholly, different, separate and distinct claim, not alleged, mentioned nor implicit in the complaint, is too well-settled and known to require discussion; in fact it is hornbook law.

I am familiar with the Banking Law of New York, by virtue of which I categorically state there is no prohibition therein against my acting as attorney for both the borrower and the lending Bank in a mortgage loan transaction. Absent any statutory or other legal interdiction against my doing so, I did represent Kimball Construction Company Inc. and Richmond Hill Savings Bank in connection with said purchase-money mortgage loan with the full knowledge and consent of both that I was acting for each of them.

Said mortgage loan closed on June 1, 1972, more than six months prior to the commencement, "in December, 1972" by plaintiffs' attorney of the first action brought by her against Kimball and others in the New York Supreme Court (moving affidavit p.9), and more than two years

prior to the inception of the conspiracy alleged in the complaint's Second Cause of Action. Obviously, my participation in that mortgage loan transaction was not and could not have been an act of or in contemplation of a conspiracy that did not and is not claimed by the plaintiffs to have existed on June 1, 1972. Moreover, and to avoid questi[illegible] relative thereto, I did not recommend said mortgage loan to the Bank, nor is it true or a fact that the Bank granted said loan on the basis of my recommendation, as plaintiffs' attorney states on page 47 of her said affidavit, again without any factual support. The application for that loan was made by Kimball Construction Company Inc. and the approval thereof was made solely and exclusively by the Bank's appropriate committee which, in the exercise of its own responsibility and judgment, acted on said loan application in the sole interest of the Bank and without regard to whether I or anyone else had recommended it. And I particularly note that there is not a word or suggestion from plaintiffs' attorney that said purchase-money mortgage loan was in any respect "improvident or otherwise improper, or was so known when made.

Beside the fact that there is no prohibition anywhere to be found in the law of the State of New York that prohibits my having acted as attorney for both the Bank and Kimball in connection with said mortgage loan transaction, it is also a fact that there is no prohibition against my having done so in the cannons of professional ethics, now codified in the Code of Professional Responsibility, if

and when acting in such duel capacity I did so, as I did, with the knowledge and consent of both parties to the transaction. Such dual capacity in such circumstances is not precluded but is permissable by the law of New York, and Disciplinary Rule "5-105(c) of said Code expressly permits such duel representation In its recent opinion #438, dated July 19, 1976, the Committee on Professional Ethics of the New York State Bar Association, expressly advised its following opinion:

> "The attorney for the lending institution may represent both the mortgagee and the mortgagor only if the requirements of DR 5-105(C) are met. If such multiple representation is to occur, there must be express consent of all concerned following full disclosure of relevant facts. ABA Inf. 837 (1965); ABA Inf. 643 (1963); N.Y. State 162 (1970); N.Y.State 199 (1971; N.Y. County 615 (1973). Cf., N.Y. State 351 (1974). See also, DR 5-105(D) and N.Y. State 426 (1976)."

Even if it were wrongful of me to have represented both the Bank and Kimball in connection with said mortgage loan transaction, my having done so is unquestionally without the slightest relevance or materiality and of no relationship whatsoever to the conspiracy alleged by the plaintiffs Were there anything wrongful in my doing so, that would be a matter of concern to the New York State Bank Department; certainly it is of no concern or business of the plaintiffs or their attorney. In view of the fact that my said conduct was neither wrongful in law or professional ethics, the characterization of it by plaintiffs' attorney as "misfeasance" and a coverup "to prevent

the Banking Department and the stockholders' from knowing how I had violated the Banking Law (p. 40), is just another unfounded and scurrilous statement of an irresponsible attorney.

To clarify and to leave no doubt of the circumstances in which the defendant, Richmond Hill Savings Bank, acted in absolute good faith in making said purchase-money mortgage loan to Kimball, I submit the annexed reports of search furnished to me by the title company, on the basis of which I acted in closing said loan. As I had no information to the contrary from Kimball's seller or their attorney, I relied upon the information contained in said reports as being true and correct.

It now appears from the memorandum of plaintiffs' attorney, in support of their motion for summary judgment, that she now admits that the plaintiffs do not have a viable "class action" since there is not the iota of a claim of any "invidiously discriminatory" conduct alleged against the defendants in the amended complaint and, implicitly that no facts exist to substantiate that claim. Nevertheless, she indicates that the action is viable on behalf of the named plaintiffs. That being so, there is then another departure from and abandonment of the claims alleged in the amended complaint, i e., a wholly different claim upon which summary judgment is now sought without a supporting complaint.

Whatever the plaintiffs claims against the Bank and me were, now are, or will be, depending upon whether the plaintiffs and their

attorney decide to hee or haw, I unequivocally, categorically and specifically state that neither I nor the Bank, in any manner or by any means whatsoever, conspired with any persons whomsoever against the plaintiffs or any other persons whomsoever, or joined or participated in any conspiracy whatsoever against them for any purpose; nor did the Bank or I ever intend or desire to do so. To that I add there is not a scintilla of evidence to the contrary.

In the final analysis, it is evident beyond peradventure that plaintiffs' claims against the Bank and me of conspiracy are nothing more than naked conclusions and assumptions which, being unsupported by any facts or evidence, are a figment of a deluded imagination and are vicious, scandalous and vengeful in their intent, purpose and object. The diatribe presented by plaintiffs' attorney neither can nor does support a motion for summary judgment. On the other hand, the indisputable facts stated by me herein and those stated in the annexed affidavit of Richard L. Thomas, fully justify and establish the right to summary judgment dismissing the amended complaint against me and Richmond Hill Savings Bank.

Sworn to before me this

23 day of November, 1976

/s/

Julius Granirer

[illegible] NEW YORK

[illegible] March 30, 1977

ANSWERING AFFIDAVIT OF RICHARD L. THOMAS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

IRVING ELLENTUCK, et al.,

Plaintiffs

-against-

JOSEPH B. KLEIN, et al.,

Defendants

- -x

ANSWERING AFFIDAVIT

Civil Action
No. 76 Civ. 2732

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

RICHARD L. THOMAS being duly sworn, deposes and says that I am Vice President of the defendant, Richmond Hill Savings Bank (hereinafter referred to as Bank) and make this affidavit in answer to plaintiffs' motion for partial summary judgment against the Bank "as to liability".

In and by their amended complaint, the plaintiffs sued to recover one million ($1,000,000.00) dollars for damages from the Bank and others. The basis for that damage claim is the "Second Cause of Action" contained in said complaint wherein it is conclusorily alleged in paragraph 86 that at some unstated time, subsequent to October 1, 1974, and at some unstated place and in some unstated manner, the Bank purposefully schemed and conspired with the named members of the

Board of Standards and Appeals, John and Marie Kimball, their corporation and the Bank's attorney, Julius Granirer, to violate the Zoning Law of the City of New York to deprive the plaintiffs and other property owners of equal protection of the law and their rights, privileges and immunities under the Constitution, for the purpose of protecting, furthering, preferring and favoring the interests of the defendants, Kimball, to enable their maintenance of an illegal dwelling in violation of the law and rights of the plaintiffs and others in the class claimed to be represented by the plaintiffs. In paragraph 87 of said complaint it is again conclusorily alleged that the purpose of the conspiracy was to and did defeat justice and the rights of plaintiffs and others to equal protection of the laws and their constitutional rights, privileges and immunities by obtaining said prejudicial treatment for the defendants, Kimball, in violation of the law. And those conclusory and factually unsupported allegations are followed by similar conclusions in paragraph 88 in that the defendants to said Second Cause of Action engaged in and committed many wrongful acts to prejudice and damage to the plaintiffs and other adjoining land owners.

Like a leafless tree in bleak midwinter, the plaintiffs' foregoing conclusions stand and remain barren of an iota of any supporting facts which so much as even suggest the existence of the alleged scheme and conspiracy, let alone the Bank's participation therein. For ex-

ample the aforesaid broad and general conclusions are unsupported by any facts as to when, where and the manner in which it is claimed the alleged scheme and conspiracy occurred, and when and how the Bank is claimed to have participated therein; nor is there an iota of fact as to what the alleged wrongful acts consisted of, when or where they occurred, who committed them, and how the plaintiffs and any others were harmed, prejudiced or damaged thereby; nor is there any mention whatsoever to be found in said complaint of any discrimination, let alone an invidious discrimination, by the Bank or any of its officers, trustees, employees or representatives against the plaintiffs or the undefined and nebulous class the plaintiffs pretend to represent.

Evidently unable to sustain their said Second Cause of Action as being factually sufficient by any answer to the pending motion heretofore made by the Bank and its attorney and co-defendant, Julius Granirer, to dismiss said cause of action because it fails to sufficiently state a claim upon which relief can be granted, the plaintiffs have elected to simply ignore the existence of said motion and, thus, evade any answer thereof, by making an independent motion for summary judgment. Not only does that procedure for summary judgment make a mockery of defendants' said motion, not only does it deprive defendants of the facts to which they were entitled as of right to be informed by the complaint, not only does it also preclude the Bank from the benefit of the disclosure procedures available to it under

the Federal Rules of Civil Procedure, not only does it make a travesty of orderly procedure, but its distillate is an obvious device to circumvent and flout the requirements and Rule 12(d) of said Rules that mandates that defendants' said motion "be heard and determined before trial on application of any party". However, justifiable the plaintiffs presume their posture to be, our system of justice and jurisprudence mandates that a defendant have its day in court at which time it will be afforded a fair and full hearing without surprises with respect to facts previously concealed and belatedly exposed upon a trial. Therefore, the Bank has instructed its attorneys herein to make application, when the plaintiffs' motion for summary judgment comes on to be heard, that that motion be deferred until the Bank's pending motion to dismiss the complaint has been determined.

The factual insufficiency of the complaint is exacerbated by the factual insufficiency of the affidavit in support of plaintiffs' motion for summary judgment. Instead of the required evidentiary facts to establish or even suggest the existence of any conspiracy or scheme in which the Bank participated (when, where, how and by whom), and what wrongful acts were committed (where, when, by whom and what they were) by the Bank and how and the manner and extent to which the plaintiffs were harmed, prejudiced or damaged thereby, and the respects and manner in which the Bank invidiously discriminated against the plaintiffs and the class they presume to represent, all of which

remain unstated and concealed, said moving affidavit is nothing other or more than a conglomerated mass of conjectures, presumptions, innuendoes and irrelevancies upon which plaintiffs' affiant and attorney bases her conclusions. The obvious reason for an explanation of the factual insufficiencies of said moving affidavit is that no facts are known to plaintiffs which bear as much as a trace of the involvement of the Bank or any of its officers, trustees, employees, or attorneys in the alleged conspiracy or, for that matter, in any conspiracy, for no such facts exist. And knowing it would be futile to try to establish any of those facts via disclosure proceedings, the plaintiffs have chosen the long-shot gamble of moving for summary judgment on the realization they have nothing to lose thereby.

Having been furnished by neither the amended complaint or plaintiffs' moving affidavit for summary judgment with any facts to answer, I unqualifiedly and categorically state:

1. As the amended complaint and said moving affidavit of plaintiffs' attorney both admit the Bank never was a party, directly or indirectly, to either of the actions or any of the litigation or to the proceedings had before the Board of Standards and Appeals, referred to in the complaint; nor did the Bank ever intervene in any of said litigation or proceeding, nor was it ever requested to do so. Stated affirmatively the Bank has at all times stood and remained aloof from, and a stranger to all said litigation and proceedings. Consequently, it has no first-hand knowledge thereof.

To my knowledge, at no time did the Bank or any of its officers, trustees, employees or representatives conspire or scheme with any of the other defendants herein or any other persons whomsoever against the plaintiffs or any members of the class they presume to represent or any other persons whomsoever for any reason, purpose or object whatsoever; nor has the Bank or any of its officers, trustees, employees or representatives done any act or thing legally or morally wrongful to the harm, prejudice or damage of the plaintiffs or their said class; nor has the Bank or any of its officers, trustees, attorneys or representatives ever discriminated, invidiously or otherwise, against the plaintiffs or the class claimed to be represented by them.

3. To my knowledge, at no time did the Bank, by any of its officers, trustees or other representatives, have any communications, written or oral, or any contacts, directly or indirectly, with any of the members or employees of the Board of Standards and Appeals with regard to the application of the Kimballs for the alleged zoning variance that was sought and obtained by them. The only communication had by the Bank with the Board of Standards and Appeals was my letter to it of January 27, 1975, a copy of which is attached to plaintiffs' moving affidavit for summary judgment as Exhibit 16, and which is hereinafter reviewed.

4. As the Bank's officer having supervisory authority and duty relative to the mortgage loan granted by the Bank to defendants, Kimball Construction Company, Inc., I, and employees of the Bank did have

occasion to have written or oral communications with the defendant, John Kimball, concerning arrears in payments required to be made by the mortgage. I never spoke or had any communication with the Kimballs concerning their application to the Board of Standards and Appeals for a zoning variance. However, pursuant to the request of their attorney, Sheldon Lobel, that the said Board be informed of the facts and circumstances in which the Bank made its mortgage loan to Kimball, I did state those facts and circumstances in my aforesaid letter of January 27, 1975, to said Board; and that is the whole of it.

The sole and exclusive basis upon which plaintiffs seek to inculpate the Bank in the alleged conspiracy and to impose a liability for damages by reason thereof upon the Bank - a basis that can only be characterized as paranoid - is my aforesaid letter of January 27, 1975, to the Board of Standards and Appeals. It is that letter alleged in paragraph 107 of the amended complaint and belabored on page 47 of the moving affidavit, and that letter alone according to plaintiffs' attorney, there being no other "illegal" or "wrongful" conduct of the Bank alleged, stated or claimed by her or by the plaintiffs, which makes the Bank a conspirator in a conspiracy with the Kimballs and the members of the Board of Standards and Appeals. That letter, the sole purpose and function of which was to inform the Board of Standards and Appeals of the facts furnished to and upon which the Bank fully relied in making its purchase-money mortgage loan

to Kimball Construction Company, Inc., speaks for itself. Therefore, said letter is incorporated herein in full and with the same force and effect as though set forth herein at length.

Plaintiffs and their attorney appear to take exception to the statement, in the second from the last paragraph of my said letter, that "Our Bank, as mortgagee, is an innocent party which would also be irreparably damaged because it acted in good faith in making the original purchase-money mortgage loan." (Complaint ¶107). The practically verbatim statement, without more, is repeated at the top of page 21 of the moving affidavit. Of course, the Bank would be severely prejudiced and damaged were the variance sought by its mortgagor, Kimball, not granted. For, then the building, which was a substantial part of the Bank's mortgage security would have been unavailable for use as a Class A multiple dwelling and would have had to be reconverted to a conforming and lesser income productive use with the result that the Bank's mortgage security would have been substantially impaired and endangered. In such circumstances, it was not only proper but essential that the Bank look to its own self-interest and that of its depositors by protecting the security of its mortgage loan. In short, the Bank acted entirely and exclusively for its own sole benefit in writing to and advising the Board of Standards and Appeals of its own predicament occasioned by no fault or neglect on its part. Moreover, there is not a word stated in the amended complaint or the affidavit in support of plaintiffs' motion for

summary judgment to indicate what, if any, consideration was given by the Board of Standards and Appeals to that letter. Therefore, if Kimball sustained any benefit from that letter, it was not only co-incidental but it is not shown by the plaintiffs as it is not known to them, the Bank or the Kimballs. The plaintiffs and their attorney are whistling in the dark.

That ill-advised attempt to censure my said letter is compounded by the factually unsupported and unjustifiable conclusion, on page 47 of the affidavit in support of plaintiffs' motion for summary judgment, that when I wrote that letter I knew that the Appellate Division had foreclosed reversion of the building to multiple dwelling status, and that I was charged with knowledge that the Board of Standards and Appeals had no jurisdiction to grant a variance, and that I was asking for something illegal. Besides being ridiculous and absurd, that assertion is a deplorable perversion of even a minimum standard of good morals.

Nowhere in said letter is there to be found a request by the Bank or me for anything, let alone something "illegal". Neither I nor the Bank has ever asked or sought for anything that is illegal. Hence, to so impugn me or the Bank is a base corruption of that letter and a calumny of the Bank and me.

The ridiculousness and absurdity of that assertion by the plaintiffs is evident in accusing me of having the stated knowledge with which I am thereby charged. Not only did I not have that knowledge

but the facts of the matter, well known to the plaintiffs and their attorney, are to the contrary. For the Appellate Division had not "foreclosed any possibility of reversion by (sic) the building to multiple dwelling status but, by its confirmation of the variance granted by the Board of Standards and Appeals said Appellate Division has approved the reversion and maintenance of the building in a "multiple dwelling status". And by its confirmation of the determination of the Board of Standards and Appeals granting said variance said Appellate Division also confirmed that the Board had jurisdiction to grant said variance. Therefore, if by my letter I "was asking for something", it certainly was not "for something illegal".

In both the amended complaint (¶107) and repeatedly in the affidavit in support of plaintiffs; motion for summary judgment it is stated that the Bank "intervened" in the proceedings had before the Board of Standards and Appeals. Presumably that claim of intervention consists of the statement of facts in my said letter to the Board of Standards and Appeals concerning the mortgage loan made by the Bank, for nothing else appears in either the complaint or the moving affidavit. I am informed by the Bank's counsel herein that that letter neither is nor can be considered an intervention by the Bank in that proceeding. For, as counsel has specifically informed me, intervention in a legal proceeding is itself a proceeding whereby one, a stranger to that legal proceeding, applies to become a party thereto. Counsel has further informed me that intervention in a legal proceeding in New

York is authorized by Sections 1012 and 1013 of the Civil Practice Law and Rules of New York which are patterned after Rule 24 of the Federal Rules of Civil Procedure, and which require that intervention be sought by "timely motion" therefor. As the Bank never asked or sought to become a party to the proceeding before the Board of Standards and Appeals, it obviously could not have intervened therein, nor did it do so.

Contrary to the allegations in the amended complaint, the affidavit in support of plaintiffs' motion for summary judgment inculpates the Bank's attorney and co-defendant, Julius Granirer, as a conspirator in the alleged conspiracy on the ground that he was guilty of a conflict of interest when he represented both Kimball and the Bank in connection with the Bank's mortgage loan. Said affidavit further charges the the New York Banking Department and the Bank's "stockholders" could hold the Bank's officials having knowledge of that conflict, as well as Mr. Granirer, personally liable for any loss sustained by the Bank (moving affidavit p. 47-48).

Assuming, arguendo, that it was improper for Mr. Granirer, as the Bank's attorney, to have represented both it and Kimball in connection with said mortgage loan, and that it was remiss on the part of the Bank's officers, having knowledge thereof, not to have prevented his doing so, none of that has any relevance whatsoever to the alleged conspiracy against the plaintiffs and their pretended "class". If there were anything improper it would be a matter solely

and exclusively for the consideration of the New York State Banking Department and the trustees and authorized officers of the Bank. In short, that belated claim of the plaintiffs is a downright impertinence and of absolutely no concern to them.

The fact of the matter is that Mr. Granirer represented both the Bank and Kimball in connection with said mortgage loan closing with the full knowledge and consent of the Bank and, I am informed by him, with the full knowledge and consent of Kimball, by virtue of which it was perfectly proper, both legally and ethically, for Mr. Granirer to have done so, so I am informed by counsel herein for the Bank and Mr. Granirer. Moreover, neither the Bank nor any persons to whom the Bank made a mortgage loan has been prejudiced, harmed or damaged by reason of Mr. Granirer's representation of both the Bank and its borrower in a mortgage loan transaction.

The asserted culpability of the Bank and Mr. Granirer as conspirators in the alleged but unstated conspiracy becomes ludicrous when one reads, in the second from the last paragraph on page 49 of plaintiffs' affidavit in support of summary judgment, that on some prior or other occasion Mr. Granirer acted as attorney for the Bank, the borrower from the Bank and the seller. However, no conspiracy is stated or claimed in respect to that transaction. Since it is implied that Mr. Granirer and the Bank indulged in that "wrongdoing" as a matter of common practice prior to the mortgage loan made to

Kimball, it defies explanation as to why the mortgage loan transaction to Kimball should suddenly be singled out as a conspiratorial act. Hence, no explanation is forthcoming from the plaintiffs. In any analysis, if the handling by Mr. Granirer of the mortgage loan for both the Bank and Kimball "was not an isolated" act but, as intimated by plaintiffs, a prevalent practice by him, it is an utter absurdity to characterize the subject loan to Kimball as an act of conspiracy or furtherance of a conspiracy against the plaintiffs.

If, indeed, any conspiracy exists, the record failure of the plaintiffs to have furnished any facts to support their claim against the Bank suggests that it is more like a conspiracy by and on the part of the plaintiffs as a retribution against the Bank for having, in the regular course of its business, granted said purchase-money mortgage loan to Kimball Construction Co. Inc. and for thereafter having sought to protect and preserve the security of said mortgage by my said letter to the Board of Standards and Appeals.

In view of the foregoing facts and the failure of the plaintiffs to have furnished a scintilla of any evidence of any conspiracy in which the Bank and Mr. Granirer were conspirators, I respectfully urge and submit that not only should the plaintiffs' motion for summary judgment against the Bank and Mr. Granirer be denied but that summary judgment should be granted dismissing the complaint as against them.

Sworn to before me this

23 day of November, 1976

/s/ Richard L. Thomas

LINCOLN D. MARKOW
NOTARY PUBLIC, STATE OF NEW YORK
— Queens County
Term Expires March 30, 1977

ORDER, DATED APRIL 6, 1976, OF NEW YORK COURT OF APPEALS

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixth *day of* April *A. D.* 1976

Present, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

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2 Mo. No. 312
Irving Ellentuck, et al.,
Appellants,
vs.
Joseph B. Klein, et al.,
Respondents.

A motion having heretofore been made herein upon the part of the respondents to dismiss the appeal taken by the appellants in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, with costs and twenty dollars costs of motion, upon the ground that no substantial constitutional question is directly involved.

Joseph W. Bellacosa

Joseph W. Bellacosa
Clerk of the Court

DECISION, DATED MAY 6, 1976, OF NEW YORK COURT OF APPEALS

2 Mo. No. 478
Irving Ellentuck, et al.,
Appellants,
vs.
Joseph B. Klein, et al., as Commissioners constituting the Board of Standards and Appeals of the City of New York, et al.,
Respondents,
and
Kimball Construction Co. Inc.,
Respondents.

Motion for leave to appeal and for a stay &c. denied with twenty dollars costs and necessary reproduction disbursements.

DECISION COURT OF APPEALS MAY 6 - 1976

ORDER, DATED SEPTEMBER 8, 1976, OF NEW YORK COURT OF APPEALS

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eighth *day of* September *A. D. 1976*

Present, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

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2 Mo. No. 803 SSD69
Irving Ellentuck, et al.,
Appellants,
v.
Joseph B. Klein, et al.,
Respondents.

The appellants having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

Joseph W. Bellacosa
Joseph W. Bellacosa
Clerk of the Court

SA-29

TITLE COMPANY REPORT OF MUNICIPAL DEPARTMENT SEARCHES, ETC.

Title No. 32,620 Q73

MUNICIPAL DEPARTMENT SEARCHES AND STREET REPORT

Any searches or returns reported herein are furnished FOR INFORMATION ONLY. They will not be insured and the company assumes no liability for the accuracy thereof. They will *not be continued* to the date of closing.

Search made by Department of Buildings:) letters
)
: to
)
Search made by Fire Department:) follow.

Premises classified in Department of Buildings as a "Heretofore Converted Class B Rooming House (28 Rooms)".
No Certificate of Occupancy required - None issued

Street Report:

ROCKAWAY BEACH BOULEVARD:- Shown 100 feet wide on Final City Plan. Dedicated for such width, according to opinion of Corporation Counsel. No proposed changes pending.

BEACH 132nd STREET:- Shown 50 feet wide on Final City Plan. Dedicated for such width, according to opinion of Corporation Counsel. No proposed changes pending.

STREET VAULTS

In New York City, if there is a STREET VAULT, it is suggested that applicant investigate possible unpaid license fees by the City of New York for the use of such vault, because the right to maintain it IS NOT INSURED, nor does the Company insure that the vault charges have been paid.

SA-30

LETTER, DATED MAY 17, 1972, OF CITY OF NEW YORK HOUSING & DEVELOPMENT ADMINISTRATION, DEPARTMENT OF RENTING AND HOUSING MAINTENANCE

RHM Form SR-1-45M-70SS47(70)
(Rev. 3/70)

THE CITY OF NEW YORK
HOUSING AND DEVELOPMENT ADMINISTRATION
DEPARTMENT OF RENT AND HOUSING MAINTENANCE

MANHATTAN
MUNICIPAL BUILDING
NEW YORK, N. Y., 10007
BRONX
1932 ARTHUR AVENUE
BRONX, N. Y., 10457
BROOKLYN
MUNICIPAL BUILDING
BROOKLYN, N. Y., 11201
QUEENS
120-55 QUEENS BLVD.
KEW GARDENS, N. Y., 11424
RICHMOND
BOROUGH HALL
ST. GEORGE, N. Y., 10301

Attorneys' Abstract Inc.,
92-32 Union Hall Street
Jamaica, N. Y. 11433

Date: 5-17-72

Date Requested: 4-27-72

Your Reference: Title # US102814/5

Our Reference : Search Clerk Kimball Const. Corp, Inc

REPORT OF SEARCH

Premises 131-16 Rockaway Beach Blvd. Search # 184293

A search of the records of this department reveals that the following violations are pending. Copies of the violations, if any, are enclosed.

Building Department, Violation Numbers: Date of Search 4-28-72

NONE

Rent and Housing Maintenance Dept., Violation Item Numbers: Date of Search 5-12-72

NONE

EMERGENCY REPAIR MONEY DUE ON THIS BUILDING

DATE	AMT.

Classification (if requested) Heretofore converted Class B

Occupancy Rooming House

Other City Agencies (on Multiple Dwellings only): Date of Search 5-12-72

NONE

IMPORTANT NOTICE ABOUT SEARCH INFORMATION ABOVE

Departmental Violations and Classification:

Nature of Report: The above information is based solely on the records of the department on the search date indicated. No inspection of the premises was involved in this search. There may be violations or changes in classification or occupancy of which this department has no knowledge and therefore do not appear in the record. Such violations or changes in classification or occupancy can be determined by a properly authorized search inspection upon payment of the prescribed fee.

Construction in Progress: Furthermore, this search does not include information regarding any violations or changes in classification or occupancy which may be involved in connection with any alteration or other application which is on file in this department and which has not been fully completed.

Other City Agency Violations or Other Corrective Orders (on Multiple Dwellings only):

Information is received from the Fire Department, Department of Health, Department of Air Pollution Control and the Department of Water Supply, Gas & Electricity. This may not represent all outstanding violations or other corrective orders on our date of search since other agencies may take 72 hours in reporting and the additional time spent in receiving and recording in this department must also be considered.

CHIEF INSPECTOR

DATE OF SEARCH MAY BE DIFFERENT FROM DATE OF POSTING

By:

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

ROBERT LA GRASSA, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 62-20 60th RD MASPETH, N.Y.

That on the 21st day of JULY, 1977, deponent personally served the within SUPPLEMENTAL APPENDIX upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

~~By leaving _____ true copies of same with a duly authorized person at their designated office.~~

By depositing 1 true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses

W. BERNARD RICHLAND
Attorney for Defendants-Appellees, Klein, Augusta, Hornstein, Carrol, Walsh, Sigman, Karlson & Stein
Municipal Building - New York, N. Y. 10007

LOUIS LEFKOWITZ
Attorney for Defendants-Appellees, Justices of New York Supreme Court
2 World Trade Center - New York, N. Y. 10047

SHELDON LOBEL
Attorney for Defendants-Appellees, Kimball
60-10 Roosevelt Avenue - Woodside, New York

DORA ABERLIN
Attorney for Plaintiffs-Appellants
150 Nassau Street - New York, N. Y. 10038

Robert La Grassa

Sworn to before me this
21st day of July, 1977

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979